UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0525 (LC)
UTLC Case Number: ACQ/52/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Costs – construction of compromise agreement – freedom of parties to freely agree and express that which they have agreed

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **ANDREW JOHN BOLTON**

Claimant

and

TAMESIDE METROPOLITAN BOROUGH COUNCIL

Acquiring Authority

Re: Wellington Works,
Wellington Road,
Ashton-under-Lyne
OL6 7EF

Determination by Written Representations

The following case is referred to in this decision:

London County Council v Tobin [1959] 1 All ER 649 (CA)

DECISION

Introduction

1. On 20 September 2013, the parties reached a mediated compromise of the Claimant's reference to this Tribunal flowing out of the Council as Acquiring Authority's compulsory purchase of the subject premises (the "Agreement").

2. The material parts of the Agreement are as follows:

> "WHEREAS
>
> a. the Claimant and the Council through their legal representatives and in the presence of the Claimant have today attended a mediation at Kings Chambers, Manchester; and
>
> b. the Claimant and the Council have reached agreement to settle the Claimant's reference ACQ/52/2012 to the Upper Tribunal (Lands Chamber) whereby the Council shall make the payments set out below in full and final settlement of the Council's liability to the Claimant in respect of his claim in the reference.
>
> "IT IS HEREBY AGREED AS FOLLOWS
>
> 1. The Council shall pay to the Claimant the sum of £475,000.00 within 14 days of receipt from the Claimant's solicitors of the bank details into which the monies shall be paid.
>
> 2. The Council shall pay to the Claimant all his costs of and incidental to the reference such costs to be assessed if not agreed.
>
> 3. The Council shall pay to the Claimant all his pre reference costs to be assessed if not agreed…"

3. Having reached that Agreement, the parties have fallen into disagreement as to what it encompasses. The Claimant seeks to recover what have been described as "necessary professional fees up to February 2012" as listed in Item 20 of the Schedule served as part of the Claimant's Statement of Case in his referral to this Tribunal on 6 March 2012.

4. That Schedule was used in the mediation, and has now been fleshed out in section 1 of the Claimant's Bill of Costs which he was ordered to file and serve. They generically are referred to as "pre-referral" or "pre-referral" costs as they principally, if not exclusively, encompass legal and other professional fees consequent upon compulsory purchase but prior to actual referral to this Tribunal.

5. In June 2015, it was ordered by the Deputy President of this Tribunal that the following preliminary issue be determined:

> "whether, considering the agreement dated 20 September 2013, the Claimant may recover his pre-reference costs from the Acquiring Authority (as are claimed in Section 1 of the Bill of Costs submitted by the Claimant) or whether such costs were included as part of the compensation agreed in paragraph numbered 1 of the said Agreement".

6. The Claimant submits that the plain and natural meaning of that which has been agreed is that he is entitled to all of his pre-reference costs because that is what the Agreement says. The Claimant has provided a Skeleton Argument and two witness statements by his solicitor Paul Westwell.

7. The Council submits that the Claimant is only entitled to his costs of preparing his claim, not the wider scope of what is conventionally encompassed within and conventionally referred to as "pre-referral costs" because such are included within the claim for and agreement to pay compensation in paragraph 1 of the Agreement so do not properly fall within paragraph 3 of the Agreement, reliance being placed upon *London County Council v Tobin* [1959] 1 All ER 649 (CA). The Council has provided a Skeleton Argument and a witness statement by its solicitor Aileen Johnson.

8. *Tobin* establishes that legal and other professional fees incurred in preparing a reference are recoverable as part of the compensation award rather then being treated as part of the cost of the referral itself. Thus, had the referral been determined by the Tribunal, one of the heads of awardable compensation would have been pre-referral costs incurred by the Claimant. The reason for this is set out in the judgment of Morris LJ:

> "… The acquiring authority wished to know what sums were claimed so that if they agreed to pay such sums there would be no outstanding claims. If a claimant could show that he had incurred expense in obtaining professional help, and that it was reasonable for him to have incurred it, and that the figure of his expense was reasonable, then the time for them to ask to be reimbursed was when he responded to the invitation contained in the notice to treat. The incurring of the expense would be a direct consequence of being disposed and of being asked to state the amount of the compensation claimed on account of such dispossession. It is to be observed that no question is raised in regard to the fees of a valuer or surveyor. But if such fees, which include fees for assessing the loss of goodwill, are to be regarded as claimable as compensation, tit seems difficult to understand why legal or accountancy fees always provided they are

deemed necessary and are properly incurred) should not similarly be regarded as ite4ms claimable as compensation."

9. In general, where parties reach a negotiated settlement or compromise, they are free to reach whatever agreement or terms they wish and to describe that which they have agreed in any manner they wish, and refer to the several heads of compensation separately or collectively as one global sum. It is up to them, and then a matter to construe that which has been reduced into writing objectively. There is no law controlling the meaning of words used within a negotiated compromise or how it is expressed.

10. As a matter of construction, it does not follow from the fact that pre-referral or pre-reference costs are in law regarded as part of awardable and recoverable "compensation" before the Tribunal that the parties can not or did not agree to structure their compromise in a way which treats those pre-referral costs separately from other sums payable under their compromise agreement. Quite the contrary, where as here such costs are itemised as a separate, unquantified but readily assessable item, the inexorable conclusion is that the parties meant what they said – that they should be assessed and payable separately from any other item payable under the agreement.

11. Reading the Agreement as a whole without *Tobin* in mind, it in my judgment is plain that the parties agreed that in addition to the £475,000 payable under paragraph 1 of the Agreement and the post-referral costs payable under paragraph 2 thereof, the Council was to pay the Claimant's costs prior to the referral of 6 March 2012 because that is what the Agreement says.

12. That conclusion is reinforced by *Tobin*. I say this because if it is right that the parties are to be treated as knowing and understanding that pre-referral costs are, as elucidated by *Tobin*, namely, but one head of that which the Tribunal could have assessed as part of "compensation for disturbance or dispossession", it is plain that for whatever reasons the parties chose to agree that that element would be paid by the Council but would have to be quantified – "assessed" – separately from that aspect of compensation which the parties could agree.

13. In this regard, it is to be born in mind that the £475,000 is not defined as "compensation" but merely one of the sums which the Council must pay as part of the "full and final settlement" of the Claimant's reference. It is therefore reasonable and proper to infer that the parties were unable to reach agreement as to the amount or quantum of pre-referral costs so leaving it for later assessment. Putting it another way, whilst the parties agreed the amount which should be paid for everything apart from pre-referral costs, they could not reach agreement as to those costs and therefore left it to be assessed later.

14. The conclusion is also consistent with paragraph 2 of the Agreement. When read together, it is plain that paragraph 2 and 3 are to the effect what pre- and post-referral costs as elucidated by *Tobin* are to be "assessed" no doubt, and by necessary implication, by the Tribunal. If the Tribunal can assess such post-referral costs, there is no reason why, as a matter of practicality, it can not assess pre-referral costs especially when that is what the parties have agreed. After all, had the matter proceeded to trial, the Tribunal would have had to assess those costs as one of the elements of awardable "compensation".

15. The Council's submitted that the parties must have intended the pre-referral costs to be encompassed within the £475,000 otherwise it would follow that the parties had not agreed "compensation" at all but would still have to, as it were, fight another day and that had that been the position they would have retained the hearing date and not compromised the referral at the mediation at all.

16. This of course involves a number of speculations, one being that the parties could not have agreed that which they expressed clearly in writing to have agreed because they had a hearing date which would have resolved same. The same argument would, of course, apply equally to post-referral costs to be assessed under paragraph 2 in respect of which no observations are made at all. So as a matter of logic, this argument fails.

17. There are however three other, more specific reasons why it fails. First, the £475,000 is not described as "compensation", thereby leaving open the possibility that it was, as is in fact the case, but one element of that which the Council had agreed to pay the Claimant. Secondly, it would have been open to the parties to quantify both pre- and post-referral costs but, for whatever reason, they choose not to but did agree to a mechanism – namely, assessment – to resolve those two issues. In that limited sense, matters remained at large, but that is what the parties agreed. Thirdly, had the parties intended that the pre-referral costs be limited to the preparation costs of the action or claim itself, the Agreement would have so stated.

18. It follows that I am unable to accept the distinction drawn by the Council between pre-referral costs and preparation costs. Not only is that not what the Agreement says, there is no reason in principle or otherwise to so limit that which has been agreed by the parties.

19. I therefore determine that the Council must to pay to the Claimant his pre-referral costs to be assessed by the Tribunal. Precisely what those are is a question of fact, and dependant upon their reasonableness, for determination on assessment by the Tribunal unless, as the Agreement provides, the parties reach agreement beforehand.

20. For completeness, I should say that I have not referred to the content of any of the witness statements. To the extent that they explain the parties' respective understanding or intent, such is inadmissible. To the extent that they exhibited documents, such merely shed light on non-contentious material available to each side.

Ultimately, this is a straight-forward construction of that which the parties expressed in writing in the Agreement.

Dated: 22nd September 2015

His Honour Judge Nigel Gerald